

STATE OF MICHIGAN
COURT OF APPEALS

LISA TYRA,

Plaintiff-Appellant,

v

ORGAN PROCUREMENT AGENCY OF
MICHIGAN d/b/a GIFT OF LIFE MICHIGAN,
STEPHEN COHN, M.D., and WILLIAM
BEAUMONT HOSPITAL,

Defendants-Appellees,

and

DILLIP SAMARA PUNGAVAN, M.D. and
JOHN DOE,

Defendants.

FOR PUBLICATION
August 15, 2013

No. 298444
Oakland Circuit Court
LC No. 2009-103111-NH

Advance Sheets Version

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

WILDER, P.J. (*dissenting*).

I respectfully dissent from the majority opinion, which reverses the trial court's order granting summary disposition in favor of defendants and remands for further proceedings on the basis of *Zwiers v Grownney*, 286 Mich App 38; 778 NW2d 81 (2009), and MCL 600.2301. Because *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005), and *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), continue to be binding on this Court, I would affirm.

I

MCL 600.2912b(1) “unequivocally provides” that a plaintiff “shall not’ commence an action alleging medical malpractice . . . until the expiration of the statutory notice period.” *Burton*, 471 Mich at 752. As the majority recognizes, even though a defective notice of intent (NOI) tolls the applicable limitations period, *Bush v Shabahang*, 484 Mich 156, 170; 772 NW2d 272 (2009), a prematurely filed complaint does not toll the period of limitations, *Burton*, 471

Mich at 752. Our Supreme Court in *Driver*, 490 Mich at 257-258, found no conflict with these parameters and found that *Burton* is still good law:

Nothing in *Bush* altered our holding in *Burton*. The central issue in *Bush* involved the effect an NOI had on tolling when the NOI failed to comply with the *content* requirements of MCL 600.2912b(4). The central issue in *Burton* involved the effect the plaintiff's failure to comply with the *notice-waiting-period* requirements had on tolling. Indeed, the *Bush* Court repeatedly emphasized that the focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b. In contrast to placing doubt on the viability of *Burton*, this aspect of *Bush* aligned with *Burton's* holding that a plaintiff must comply with the notice waiting period to ensure the complaint tolls the statute of limitations.

Plaintiff filed her complaint and affidavit of merit in this case only 112 days after serving the notices of intent on defendants in contravention of MCL 600.2912b(1), which requires that a plaintiff wait at least 182 days before “commenc[ing]” an action.¹ Thus, I would find that we are bound to conclude that plaintiff's action was not properly commenced. MCL 600.2912b(1); *Burton*, 471 Mich at 752.

Further, I disagree with the majority's conclusion that defendants waived, or even could have waived, an affirmative defense that plaintiff's complaint was prematurely filed. In its order in *Auslander v Chernick*, 480 Mich 910; 739 NW2d 620 (2007), the Supreme Court concluded that a defendant can still raise the issue of a plaintiff failing to comply with MCL 600.2912b irrespective of whether the defendant properly asserts it. Because the order in *Auslander* is also binding on this Court, see *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369-370; 817 NW2d 504 (2012), I would further conclude that defendants did not waive their affirmative defenses that the instant medical malpractice action was not properly commenced.

II

The majority also reverses and remands on the basis of this Court's ruling in *Zwiers*, 286 Mich App 38 and MCL 600.2301. I disagree with this disposition. Although not a medical malpractice statute, MCL 600.2301 does apply to medical malpractice actions because it applies where “*any* action or proceeding is pending.” (Emphasis added.) The statute provides in full:

The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

¹ Certain conditions can reduce this waiting period. See, e.g., MCL 600.2912b(3) and (7).

Thus, “MCL 600.2301 only applies to actions or proceedings that are *pending*.” *Driver*, 490 Mich at 254. The Supreme Court concluded in *Driver* that MCL 600.2301 was inapplicable under the facts of that case because, since “an NOI is part of a medical malpractice ‘proceeding’” and the applicable limitations period had already expired by the time the defendant was served with the NOI, there was no existing “proceeding” in that case. *Id.* The Court noted that the NOI could not have been part of any “proceeding” because plaintiff’s claim was already time-barred when plaintiff served the NOI. *Id.*

Applying the Supreme Court’s analysis in *Driver* to the facts in this case, plaintiff’s complaint cannot be resurrected under MCL 600.2301. I agree that at the time plaintiff properly served NOIs to defendants, a *proceeding* was pending to which MCL 600.2301 would have been applicable. However, the limitations period expired without commencement of a medical malpractice action because plaintiff’s complaint was filed prematurely. Since “[a]n action is not ‘pending’ if it cannot be [or was not] ‘commenced,’”” *id.*, there was no *action* pending in the trial court to which MCL 600.2301 could be retroactively applied. Moreover, retroactive application of MCL 600.2301 would affect defendant’s substantial rights because defendant would be “denied its right to a statute-of-limitations defense,” which is plainly contrary to, and not in furtherance of, the Legislature’s intent in enacting MCL 600.2912b. *Id.* at 255.²

In this regard, this Court’s holding in *Zwiers*, 286 Mich App 38, is significantly undermined by our Supreme Court’s later decision in *Driver*. In *Zwiers*, the plaintiff timely filed her NOI but had inadvertently filed her complaint 181 days after serving the NOIs on the defendants instead of the statutorily prescribed 182 days. *Id.* at 39. The trial court granted the defendants’ motion for summary disposition on the basis that the complaint failed to commence the action and toll the limitations period. *Id.* at 40. Finding that no substantial right of the defendants was affected, that resolving the case on the merits was in the interests of justice, and that MCL 600.2301 was applicable to the entire notice process, the *Zwiers* Court found that under MCL 600.2301, the plaintiff was entitled to amend the filing date of the complaint and affidavit of merit. *Id.* at 50-52.

Zwiers was undermined by the Supreme Court’s subsequent decision in *Driver* for several reasons. First, because the plaintiff in *Zwiers* prematurely filed her complaint, no *action* was commenced by the plaintiff before the limitations period expired, and therefore, no *action* was ever pending such that the trial court would be authorized under MCL 600.2301 to permit an amendment of the complaint by which plaintiff attempted to commence the action. *Driver*, 490 Mich at 254. Second, *Driver*’s holding, that a statute of limitations defense is a substantial right to which a defendant is entitled, contradicts the finding in *Zwiers* that no substantial right of the

² Thus, even assuming the expiration of the limitations period did not also extinguish the proceeding which commenced with the filing of the NOI, any amendment of plaintiff’s complaint in an attempt to retroactively meet the requisite limitations period would also affect defendant’s substantial rights by depriving it of a valid statute of limitations defense, such that MCL 600.2301 would be inapplicable.

defendants was affected by permitting the filing of an amended complaint pursuant to MCL 600.2301.³

For the reasons stated herein, I respectfully dissent and would affirm the trial court's order granting summary disposition in favor of defendants.

/s/ Kurtis T. Wilder

³ Notably, unlike the Supreme Court in *Driver*, the *Zwiers* Court did not address the impact of the defendants' right to a statute of limitations defense on the trial court's ability to utilize MCL 600.2301 to resurrect the plaintiff's cause of action; instead, it only focused on the fact that "[t]here was no evidence of interrupted settlement negotiations on the date of filing[] and [that the] defendants had the time and opportunity to investigate plaintiff's allegations as evidenced by defendants' response to plaintiff's NOI under MCL 600.2912b(7)." *Zwiers*, 286 Mich App at 51.